Datumcorp International Sdn Bhd & Anor v Mohd Salehuddin bin Abd Samad

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCVC-146–03 OF 2015
ABDUL MAJID JC
5 MARCH 2018

Tort — Damages — Trespass — Defendant involved in demonstration against plaintiffs' development project — Plaintiffs incurred costs due to alleged trespass by defendant — Whether defendant organiser of demonstration

The defendant, a self-claimed chairman of an unregistered committee of Taman Keramat involved in a demonstration on 25 January 2015 against the plaintiffs' development project ('the project'). The plaintiffs claimed that the defendant was the organiser who had instigated the crowd to oppose the project by force, to commit trespass and to vandalise the plaintiffs' property. It was not disputed that the demonstration did not comply with the requirements of the Peaceful Assembly Act 2012. In the present case, the plaintiffs claimed for the cost incurred as well as injunction to prevent future demonstration. The issue for court's decision was whether the defendant was the organiser.

Held, dismissing the plaintiffs' claim with costs:

(1) There was no evidence led by the plaintiff as to who made arrangement for the event, who invited the speakers, who invited the organisations to participate. There was no record of the speeches or even notes taken to support the allegation that the defendant had instigated the crowd. There was also no evidence proving that he was in control of the participants and whether they were his agents, followers or servants. Based on the evidence adduced, the plaintiff had failed to discharge its burden on the balance of probabilities in proving that the defendant was the organiser. Notwithstanding the concession by learned counsel for the defendant that the defendant was the 'penggerak', being the one who spearheaded the protest did not mean he organised the assembly or the demonstration on 25 January 2015 (see paras 29 & 31).

[Bahasa Malaysia summary

Defendan, yang mendakwa diri sendiri pengerusi jawatankuasan yang tidak berdaftar di Taman Keramat terlibat dalam demonstrasi pada 25 Januari 2015 terhadap projek pembangunan plaintif-plaintif ('projek tersebut'). Plaintif-plaintif mendakwa bahawa defendan adalah penganjur yang telah menghasut orang ramai untuk membantah projek tersebut dengan desakan,

untuk melakukan pencerobohan dan untuk merosakkan hartanah plaintif-plaintif. Ia tidak dipertikaikan bahawa demonstrasi itu tidak mematuhi keperluan Akta Perhimpunan Awam 2012. Dalam kes ini, plaintif-plaintif menuntut untuk kos yang ditanggung dan juga injunksi bagi menghalang demonstrasi masa hadapan. Isu untuk keputusan mahkamah adalah sama ada defendan adalah penganjur.

Diputuskan, menolak tuntutan plaintif-plaintif dengan kos:

(1) Tiada keterangan yang dikemukakan oleh plaintif berhubung siapa yang membuat urusan untuk acara itu, siapa yang menjemput speaker, siapa yang menjemput organisasi untuk menyertai. Tiada rekod berhubung ucapan ataupun nota yang diambil untuk menyokong dakwaan bahawa defendan telah menghasut orang ramai. Tiada juga keterangan membuktikan bahawa dia mempunyai kawalan ke atas para peserta dan sama ada mereka adalah ejen, pengikut atau pekerja mereka. Berdasarkan keterangan yang dikemukakan, plaintif telah gagal melepaskan bebannya atas imbangan kebarangkalian untuk membuktikan bahawa defendan adalah penganjur. Walau apa pun konsesi oleh peguam yang bijaksana bagi pihak defendan bahawa defendan adalah 'penggerak', yang merupakan orang yang menerajui bantahan tersebut tidk bermaksud di telah menganjurkan perhimpunan atau demonstrasi itu pada 5 Januari 2015 (lihat perenggan 29 & 31).]

Notes

For a case on trespass, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 373.

Cases referred to

Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433; [2000] 1 MLRA 617, CA (refd)

Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor [1981] 1 MLJ 139, FC (refd)

Kerajaan Malaysia v Ambiga Sreenevasan [2016] 5 MLJ 721, CA (refd)

Teh Eok Kee & Anor v Tan Chiah Hock & Anor [1995] 3 MLJ 613, SC (refd)

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Legislation referred to

Peaceful Assembly Act 2012 s 3

Sankara Narayanan a/l Sankaran Nair (Muralidharan Kalidass with him) (SN Nair & Partners) for the appellants.

Hasnal Rezua Merican (Effa Azuin bt Aidrul Hisham with him) (The Chambers of Kamarul Hisham & Hasnal Rezua) for the respondent.

Abdul Majid JC:

INTRODUCTION

[1] The plaintiff, Datumcorp International Sdn Bhd is a wholly owned subsidiary company of the Selangor State Development Corporation and the registered owner of a piece of land held under Hakmilik Sementara HS(D) 75477, No PT 5087, Seksyen 2, Bandar Ulu Kelang, Daerah Gombak, Selangor ('developer'). The plaintiff obtained an approval from the Ampang Jaya Municipal Council to construct a commercial development known as the Datum Jelatek Condominum Project ('project'). The second plaintiff Conlay Construction Sdn Bhd is the contractor appointed by the first plaintiff to construct the said project ('contractor'). The defendant is a resident of Taman Keramat a self-claimed chairman of an unregistered association known as the Datum Jelatek Action Committee ('committee') purportedly representing the local residents. It was not disputed that this committee was set up primarily to oppose the project.

BACKGROUND FACTS

[2] On 25 January 2015 an assembly of persons was held to demonstrate against the project near its site. Speeches were made by various individuals from several organisations and followed by a street protest which eventually had trespassed into the project's site. They had caused damage to property belonging to the plaintiffs. The staff and workers of the plaintiffs were also threatened by the aggressive participants of the street protesters. The plaintiffs subsequently had incurred RM75,500 as cost to restore the site as well as allowances for the guards deployed at the site during the material time.

THE PLAINTIFFS' CLAIM

[3] It is the plaintiffs' claim that the defendant was the organiser/mover of the assembly and demonstration and he had instigated the crowd to oppose the project by force. The plaintiffs further alleged that the defendant had caused the participants of the assembly to commit trespass and vandalise the property of the plaintiffs.

[4] It was not disputed that the organiser did not comply with the requirements of the Peaceful Assembly Act 2012.

[5] In addition to claiming the cost incurred, the plaintiffs seek to obtain an injunction preventing the defendant, his workers, agents and/or supporters in organising any future demonstration opposing or preventing the construction

of the project; trespassing or cause to trespass the project's site; causing further damage property or threatening the staff/representatives/agents of the plaintiffs at the site.

ISSUES

[6] The issues to be tried filed by the plaintiffs are premised upon the defendant being the organiser. If the court finds this fact is proven, then the defendant is liable for the rest of the consequences by his act or omission.

Whether the defendant was the organiser

[7] Learned counsel for the plaintiff did not come up with any definition of organiser. He relied on the conduct and the statements uttered by the defendant instead. Relying on three articles namely exh P1 (Bundle B p 92), exh P2 (Bundle B p 90) and exh P3 (Bundle B p 93) written by PW1 and the evidence of PW2, PW3 and PW4, learned counsel for the plaintiff submitted that the defendant being the chairman of the committee had organised the demonstration/assembly and had led the protest against the project at the material time.

[8] Learned counsel for the defendant on the other hand referred to the definition of organiser in s 3 of the Peaceful Assembly Act 2012 ('the PAA 2012') which provides as follows:

> 'organizer' means a person who is responsible for the organization of an assembly, including the arranging, convening, collecting or forming of the assembly, or who is responsible for the conduct of an assembly;

He did not dispute that the defendant was a mover and participated in the illegal assembly but not the organiser of the same. By being the chairman of committee he represented the local residents protesting the construction of the condominium. But that, according to learned counsel for the defendant, did not make him an organiser of the event on 25 January 2015.

[9] In *Black's Law Dictionary* (2nd Ed) the word 'organise' is defined as

> To establish or furnish with organs; to systematize; to put into working order; to arrange in order for the normal exercise of its appropriate functions.

[10] The *Concise Oxford English Dictionary* (11th Ed), Revised defines it as 'to arrange systematically; make arrangements or preparations for; form people into a trade union or other political group'. And the *Oxford Dictionary* defines 'organiser' as a person who arranges an event or activity.

[11] Unlike the case of *Kerajaan Malaysia v Ambiga Sreenevasan* [2016] 5

MLJ 721, this action is not premised on the PM 2012, however the definition certainly to my mind would assist the court in making a finding whether the defendant was the organiser as the said definition under the PM 2012 comprises of all the elements that are attributable to the word 'organiser'.

[12] Hence, it would depend very much on the conduct of the defendant prior to, during and after the event on 25 January 2015. Beginning November 2014 vide a letter dated 14 November 2014 he wrote a letter in his capacity as the chairman of the committee, inviting the senior management of the Selangor State Development Corporation to a briefing session about the project for Taman Keramat residents (Bundle B p 30). The chief operation officer of the developer vide a letter dated 19 November 2014 responded that it was not necessary since there was already a session held earlier on 31 March 2013 with the residents (Bundle B p 35). That is about all as far as the correspondence is concerned.

[13] PW3 Shah Faezal bin Sorparno the senior manager of the project testified that despite three briefing sessions with the residents held on 7 January 2015, 14 January 2015 and 21 January 2015, the defendant maintained his protest.

[14] PW3 told the court that on 25 January 2015 the defendant had organised an assembly and demonstration attended by his supporters/agents. The defendant and other individuals were seen giving speeches instigating the crowd to protest the project. He further testified that thereafter the defendant led a street protest heading towards the project's site and committed trespass and vandalism. According to him, the defendant and the participants made threats and intimidated the staff and workers of the plaintiffs. The defendant never at any point of time attempted to control the crowd against causing any damage or advised them not to be disorderly.

[15] PW3 further testified that he and PW4 Noorhisham bin Jamil were tasked to monitor and took photographs (Bundle pp 69–76 and pp 164–178 during the demonstration. According to PW3 the cost of repairing the damage was RM75,000 incurred by the contractor and reimbursed by the developer. PW3 admitted that there were many other speakers from other organisations and political parties like PERKASA, UMNO, JMM apart from the defendant who addressed the crowd. PW3 lodged a police report thereafter (Bundle B pp 36–37). He further agreed under cross-examination that the defendant was not seen in the photographs which showed the participants causing destruction at the project's site.

[16] PW2 Mohd Razak bin Mohd Anuar a security officer employed by the contractor testified that he and about 29 others were deployed at the scene on

25 January 2015 as they were informed a week earlier of a plot to be led by the defendant to sabotage the construction would take place on that day. He knew the defendant as he was also a local resident. According to him the defendant led the demonstration and he identified the defendant who was seen in the photographs namely, the defendant was holding a microphone giving a speech Bundle B p 70 and the defendant leading a street protest heading towards the project's site at pp 73–74.

[17] However under cross-examination referring to the photograph at p 73 he admitted that there were others marching in front of the defendant. his evidence is reproduced as follows:

Peg Def:	En Razak setuju dengan saya kalau tengok gambar tu, En Saleh ni ... dia bukanlah yang jalan depan sekalikan? Ada orang depan dia lagi. Dia bukan orang yang jalan depan sekalikan> ada orang depan dia.
PW2:	Kalau macam itu Encik kena tunjuklah gambar yang besar.
Peg Def:	Haa tulah, dia tak ada ... kita ada gambar ni je.
PW2:	Tapi saya ada di tempat kejadian.
Peg Def:	Betul, betul. Ni gambar ni ... cuba tengok gambar ni.
PW2:	Saya ada tempat kejadian.
Peg. Def:	Saya suruh berdasarkan pada gambar ni saja. Ada tak orang depan ...
PW2:	Depan-depan ni wartawan yang banyak. Dengan polis.
Peg Def:	Yang pakai bandena Anak Keramat ni pun, polis dengan wartawan ke? Ni yang depan gambar ni?
PW2:	Dia pun tak jauh daripada En Saleh, Encik.
Peg Def:	Yalah. Tapi ada orang depan dia, ya.
PW2:	Aaa.

[18] He further admitted that the defendant was not seen in the photographs showing the participants committing vandalism at the project's site. After the incident, PW2 lodged a police report (Bundle B pp 38–39).

[19] PW4 Noorhisham bin Jamil's evidence was substantially similar to PW2 and PW3. He too lodged a police report after the incident (Bundle B pp 40–41)

[20] It is now pertinent to look at the three reports lodged by PW2, PW3 and PW4. As I have adverted earlier the defendant was no stranger to PW2 however PW2 did not identify the defendant as the organiser. In his report he said among others, as follows:

A ... Pihak penganjur telah memanggil beberapa orang untuk memberi ucapan di dalam perhimpunan ini iaitu: Salleh Samad (Pengerusi Badan Bertindak Bantah Datum Jelatek) ...

... Pada jam 12.00 tengah hari peserta perhimpunan sebanyak 200 orang telah berarak ke Jalan Enggang berhadapan dengan pintu masuk tapak projek diketuai B oleh penduduk tempatan bernama Faizul bin Yatim, Zubir, Boy Maarof, Budin dan Zuri. ...

[21] I find it strange that the defendant was not named in the report as PW2 being a local resident and knew the defendant and notwithstanding claiming C that the defendant led the street protest in his evidence before me. And there is nothing in the said report implicating the defendant. PW3 and PW4's police reports in Bundle B p 36 and Bundle B p 40 respectively of which the contents are substantially similar too did not identify the defendant as the organiser or even leading the protest and caused any destruction or trespass. The defendant D was only identified as one of those who were called upon by the organiser to give a speech. Instead they identified and named other individuals as those who had trespassed and vandalised the property of the plaintiffs.

E **[22]** These reports were made on 25 January 2015 after the event. They could have just easily named the defendant as the organiser and the leader but they did not. Therefore, when they testified before me alleging the defendant was the organiser and the leader, I do not think I can subscribe to their testimonies. Chang Min Tat FJ in *Tindok Besar Estate Sdn Bhd v Tinjar Co* F [1979] 2 MLJ 229 at p 234 said:

Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary G evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. H Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

In *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ I 433; [2000] 1 MLRA 617 at p 620 Siti Norma Yaacob JCA (as she then was) had this to say:

In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it is also

encumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact.

[23] Based on the authorities above I do not think I could rely on their evidence to conclude that the defendant was the organiser or the leader of the street protest or even the instigator. I also do not find evidence to show on the balance of probabilities that he was responsible for the trespass and damage done at the project's site.

[24] Learned counsel for the plaintiff also relied on the evidence of PW1 Rahmah bt Ghazali a reporter from *The Star* newspapers. According to PW1 an article (exh P1) was processed by her. Exhibit P1 was based upon a media statement issued by PKNS. When asked about the contents of the media statement, she stated as follows:

Peg Pit:	Boleh kamu terangkan apakah kandungan artikel ini?
PW1:	Kandungan ini menyatakan bahawa Datum Jelatek Condominium yang mencetus kontroversi. Majoriti yang berminat untuk membeli Datum Jelatek ini adalah bumiputera. Majoritinya adalah bumiputera.
Peg Pit:	Boleh kamu ke muka 93, iaitu muka surat seterusnya artikel ini. Di muka surat 93, boleh kamu bacakan perenggan pertama di situ?
PW1:	Yang, 'The protesters, led by Datum Jelatek Action Committee Chairman Salleh Samad, claimed that the project would not benefit the Malays, as most could not afford to purchase the condominium'.

[25] PW1 was cross-examined and it went this way:

Peg Def.:	Puan Rahmah setuju dengan saya, perenggan pertama di muka surat 93 yang Puan Rahmah kata, Puan Rahmah masukkan?
PW1:	Ya.
Peg Def.:	la bukan sebahagian daripada kandungan di muka surat 90 dan 91, setuju?
PW1:	Ulang lagi sekali boleh?
Peg Def.:	Perenggan yang Puan Rahmah masukkan di muka surat 93, perenggan 1 tu, yang Puan Rahmah baca tadikan ... that your product, you kata you buat sendiri untuk memberi kontekskan?
PW1:	Ya, betul.

Now, the article referred to in Bundle B pp 90–91 (exh P2) was written by her after she interviewed the defendant over the telephone. And this was after the incident. It was reported that the defendant had made remarks like 'this could

lead to a bloodshed', 'don't play with fire' and 'this will bring about a similar situation like 13 May 1969'. The defendant was also said to have been spearheading the protest since 2010.

[26] To my mind, even if the defendant had been spearheading protests against the project, there must be evidence to show that on 25 January 2015 he was the one who organised and led the assembly and the demonstration.

[27] The person who issued the media statement which contents were relied upon by PW1 was not called. An assertion made out of court is hearsay. Be that as it may, learned counsel for the defendant did not object to its admission. I am mindful of *Teh Eok Kee & Anor v Tan Chiah Hock & Anor* [1995] 3 MLJ 613 at p 627 Edgar Joseph Jr FCJ held as follows:

> Evidence of these admissions was also admissible on the broader ground that if the party in a civil suit says that he does not dispute the truth of a fact, the court will not require the opposite party to prove such fact.

[28] As for exh P1 even if it is to be relied upon, there is nothing to indicate that the defendant was the organiser of the event on that day. Remarks like 'this could lead to a bloodshed', 'don't play with fire' and 'this will bring about a similar situation like 13 May 1969' uttered by the defendant to my mind do not necessarily establish that the defendant was the organiser or even the leader. Such expressions could come from any of the protestors in manifesting their anger or frustration over the decision of the Selangor State Government to proceed with the project what more when interviewed by reporters as that will take their message across to a bigger section of the population. To my mind, those remarks do not make the defendant the organiser of the illegal assembly or demonstration on 25 January 2015.

[29] There was no evidence led by the plaintiff as to who made arrangement for the event, who invited the speakers, who invited the organisations like PERKASA, JMM and UMNO to participate. There is no record of the speeches or even notes taken to support the allegation that the defendant had instigated the crowd. There was also no evidence proving that he was in control of the participants and whether they were his agents, followers or servants. The newspapers' reports and articles from pp 85–89, 93.1–95 and pp 96–109 are hearsay therefore, inadmissible.

[30] The Federal Court in *Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139 approved the approach by the learned trial judge with regard to the burden of proof that 'until and unless the plaintiff had discharged the onus on her to prove her case on a balance of probabilities the burden did not shift to the defendant and no matter if the

defendant's case was completely unbelievable, the claim against him must in this circumstance be dismissed'.

[31] Based on the evidence adduced, I find that the plaintiff has failed to discharge its burden on the balance of probabilities in proving that the defendant was the organiser. Notwithstanding the concession by learned counsel for the defendant that the defendant was the 'penggerak', as I said being the one who spearheaded the protest does not mean he organised the assembly or the demonstration on 25 January 2015. In the circumstance the plaintiffs' claim is dismissed with costs.

Plaintiffs' claim dismissed with costs.

Reported by Dzulqarnain Ab Fatar